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IN THE COURT OF APPEALS OF IOWA

Filed October 23, 1984

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VICKI M. PARSONS,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF JOB SERVICE,

Respondent-Appellee,

and **IOWA LUTHERAN HOSPITAL,**

Respondent.

4-289
83-1348

Appeal from the Iowa District Court for Polk County - Harry Perkins, Judge.

Petitioner appeals from the district court decision on judicial review affirming the respondent agency's decision to deny unemployment compensation benefits. AFFIRMED.

David L. Dorff, Des Moines, for petitioner-appellant.

Walter F. Maley, Blair H. Dewey and Edmond Schlak, Jr., Des Moines, for respondent-appellee agency.

Considered en banc.

SACKETT, J.

The petitioner, Vicki Parsons, appeals from the district court's decision on judicial review affirming the respondent/agency's final decision denying petitioner's claim for unemployment compensation benefits. Petitioner claims the agency's decision was erroneous. Parsons asserts that the false statements she made about seeing a nurse and her actual failure to see a nurse before going home sick did not constitute misconduct such as would disqualify her from receiving unemployment benefits. We affirm.

Ms. Parsons was employed by Iowa Lutheran Hospital as an insurance billing clerk from August 1, 1979 until May 21, 1982. On May 19, 1982 Parsons became ill at work. She followed applicable company policy and twice went to see one of the employee health nurses, and was sent home after the second visit, with instructions to see her doctor.

The following day, May 20, Parsons returned to work. According to her testimony, however, she was still sick, and so decided it would be best to go home. Parsons went to inform her supervisor, Carol Fatino, of her decision to leave work. Fatino asked Parsons if she had seen an employee health nurse, and Parsons told Fatino that she had. In fact, Parsons' statement was a lie. She had not seen the nurse as she had the day previous and as required by company policy.

Later on May 20, Fatino checked with the health nurse and discovered Parsons had not consulted with her before going home. Fatino then went to the office of the personnel director to discuss the matter.

On the third day, May 21, Parsons did not report to work at 8:00. She testified, however, that she called a fellow employee to say that she was still feeling ill, but would be in at noon if she felt better. This information was to be given to Fatino when Fatino arrived at work. The testimony about the phone calls was neither confirmed nor denied.

Parsons did return to work at noon. Shortly after her return, Parsons was called into an office by Fatino. Fatino told Parsons that a check had been made, and that Fatino knew Parsons had not seen the nurse. Parsons then stated she had seen a different nurse. When Fatino stated the other nurse had not been on duty, Parsons said she had seen the different nurse in the hall. Fatino then discharged Parsons.

Both of Parsons' statements were false. Parsons' explanation for these two lies was that she had seen termination papers lying on a desk and that she was trying to preserve her job.

After her termination, Parsons applied for, and was awarded unemployment compensation benefits. The employer appealed the award of benefits and a hearing was held. At the hearing the employer presented evidence that there was a company policy requiring employees to see a nurse before leaving work because of illness. Parsons testified, however, that she was unaware of any such company policy.

The hearing officer found Parsons guilty of misconduct and disqualified from receiving unemployment benefits under section 96.5(2)(a) of the Iowa Code (1981). Both the Job Service Appeal Board and the district court have affirmed that ruling.

Iowa Code section 96.5 provides that [a]n individual shall be disqualified for benefits. . .(2) [i]f the department finds that the individual has been discharged for misconduct in connection with the individual's employment. . ." Iowa Code §96.5.2 (1983) emphasis added).

The definition of "misconduct" relevant to this situation is found in the Iowa Administrative Code. "Misconduct" is defined as:

> . . . a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment.

> Misconduct as the term is used in the disqualification provision as being limited to conduct envincing such willful and wanton disregard of an employer's interest as is found in deliberate violation and disregard of standards of behavior which the employer has the right to expect of employees, or in careless or negligence of such a degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

370 Iowa Administratrative Code §4.32(1)(a)(1983).

This general definition of misconduct was approved by the Iowa Supreme Court in Huntoon v. Iowa Dept. of Job Service, 275 N.W.2d 445, 448 (Iowa), cert. denied, 444 U.S. 852, 100 S. Ct. 105 62 L.Ed.2d 68 (1979), because it "accurately reflects the intent of the legislature." Higgins v. Iowa Dept. of Job Service, 350 N.W.2d 187, 190 (Iowa 1984)(quoting language from the Huntoon opinion).

We have the authority to hear and decide this appeal pursuant to Iowa Code section 17A.20 which provides that "[a] n aggrieved or adversely affected party to the judicial review proceeding may obtain a review of any final judgment of the district court under this chapter by appeal to the supreme court. . ." Code of Iowa §17 A.20 (1983). Our review is limited to a determination of whether the district court made errors of law when it exercised its power of review of agency decision under Iowa Code section 17 A.19. Woods v. Iowa Dept. of Job Service, 315 N.W.2d 838, 840 (Iowa Ct. App. 1981); Jackson County Public Hospital v. PERB, 280 N.W.2d 426, 429 (Iowa 1979). Iowa Code section 17A.19 limits the district court's review to a determination of whether the agency committed any of the errors of law set out in section 17A.19(8). This is a finite list which provides that relief be offered a petitioner who has had substantial rights prejudiced if the agency action was:

a. In violation of constitutional or statutory authority;
b. In excess of the statutory authority of the agency;
c. In violation of an agency rule;
d. Made upon unlawful procedures;
e. Affected by other error of law;
f. In a contested case, unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole; or
g. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a merely unwarranted exercise of jurisdiction.

Code of Iowa §17A.19(8)(a)-(g)(1983). Therefore, to determine if the district court properly exercised its power of judicial review "this court applies the standards outlined in section 17A.19(8) to the agency decision, [with consideration of the whole record,] to determine whether this court's conclusions are the same as those of the district court. If the conclusions are the same, affirmance is in order, of they are not, reversal may be required." Jackson County, 280 N.W.2d at 429-30.

We are bound by the agency's findings of fact if they are supported by substantial evidence. Evidence is substantial if a reasonable person could rely on it as sufficient to reach similar findings. Woods, 315 N.W.2d at 841. The fact that a different result could have been reached is irrelevant. New Homestead v. Iowa Dept. of Job Service, 322 N.W.2d 269, 270 (Iowa 1982). While the substantiality of evidence must fairly take into account whatever in the record fairly detracts from its weight, Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456, 467 (1951); Briggs v. Board of Directors, 282 N.W.2d 740, 743 (Iowa 1979), the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's decision from being supported by substantial evidence. Peoples Memorial Hosp. v. Iowa Civil Rights, 322 N.W.2d 87, 91 (Iowa 1982); City of Davenport v. PERB, 264 N.W.2d 307, 311 (Iowa 1978).

Applying these principles to the case at bar, we are persuaded that the record when viewed as a whole does in fact substantiate the decision made by the

agency and affirmed by the trial court to deny the petitioner, Ms. Parsons, unemployment benefits.

It is a company policy that employees who feel ill will not be permitted to leave work before going to see an employee health nurse. This policy is outlined in the employee manual and was also told to Ms. Parsons during orientation prior to her employment. She followed this policy at least two (2) times prior to leaving work on May 19, 1982. Carol Fatino testified before the hearing officer that it was common knowledge in the office that this was the policy to be followed by the workers. On May 20, 1982, Ms. Parsons chose to disregard this policy. This constituted a deliberate act on the part of Ms. Parsons and cannot be passed of as "a good faith error in judgment or discretion" because she was reminded that she should see a health nurse by her supervisor just prior to leaving for home.

Further, when Petitioner was confronted with knowledge that her supervisor was aware of the fact that she had not seen the health nurse before leaving work on May 20, 1982, Petitioner fabricated a story about seeing a different nurse. This "different" nurse was not on duty, nor at the hospital on May 20, 1982. Petitioner also lied when she told Fatino she had seen a nurse, pursuant to company policy, prior to ever leaving on May 20.

These instances of conduct demonstrate a disregard of the standard of behavior which an employer has a right to expect from employees, within the definition of misconduct contained in 370 Iowa Administrative Code section 4.32(1). The misconduct evinced by the petitioner was substantial such as warrants a disqualification of benefits. See Budding v. Iowa Dept. of Job Service. 337 N.W.2d 219, 222 (Iowa Ct. App. 1983)(also see J. Donielson's dissent).

AFFIRMED.

All judges concur except Schlegel, J. and Oxberger, C.J., who dissent.

I respectfully, but vigorously dissent. I believe the majority's opinion is erroneous in two fundamental respects. First, the majority incorrectly relies on the fact that Ms. Parsons violated company policy. Second, the majority incorrectly concludes that Parsons' acts of lying constituted misconduct sufficient to disqualify a person from unemployment compensation benefits. I do not believe Parsons was guilty of such misconduct and would reverse.

I. Company Policy. Whether or not Parsons violated company policy is immaterial in this case because Parsons was discharged solely for lying. Carol Fatino, who personally discharged Parsons, testified that the discharge was for "falsificiation of the reason she was gone that day." Fatino later testified to the same effect:

> EMPLOYER'S REP: Miss Fatino, is it correct from the testimon—testimony given so far that Miss Parsons was discharged for her dishonesty and not the fact whether she was sick or not?
>
> CAROL FATINO: That's correct.

The hearing officer and district court also rested their decisions on Parsons' dishonesty. The hearing officer concluded "that lying . . . does show a willful and wanton disregard of the employer's interest," and is therefore misconduct. The district court's ruling stated:

> The petitioner, in her brief, concedes that the facts are not in dispute but argues that her actions do not constitute "misconduct" as a matter of law. The hearing officer concluded otherwise, and this Court is of the same opinion. The action of the petitioner in lying was misconduct as that term is defined in 370 I.A.C. Section 4.32(1)(2). Such misconduct was the basis for her discharge and denial of unemployment benefits.

Thus, the majority incorrectly relies on the violation of company policy to reach its decision.

Even if the majority is correct in its belief that bad acts that were not the basis for discharge can be used after the fact to justify denial of benefits, reliance on a violation of company policy is misplaced in this case. Although the majority

opinion does not acknowledge it, the hearing officer specifically found that Parsons "was not aware that it was mandatory to see the Employee Health Nurse before leaving work if she became ill at work . . . ." The majority is bound by that finding of fact if it is supported by substantial evidence. Iowa Code § 17A.19(8)(f); Woods v. Iowa Department of Job Service, 315 N.W.2d 838, 840 (Iowa Ct. App. 1981). Evidence is substantial if a reasonable person could rely on it as sufficient to reach similar findings. Woods, 315 N.W.2d at 841 (emphasis added).

The evidence does support the hearing officer's finding that Parsons did not know of the policy. Contrary to what is stated in the majority's opinion, the evidence does not show that Parsons was informed of the policy during orientation. Carol Fatino stated that the policy was explained as part of employee orientation at the time of the hearing. However, Fatino also testified that she didn't know if Parsons received such orientation when Parsons was hired in 1979.

The evidence also suggests that the policy did not become established until October of 1980, more than a year after Parsons was hired. Moreover, the policy was printed only in a central company handbook that employees were not required to read; employees were given a smaller version of the personnel handbook. The small version of the handbook given to Parsons did not contain the company policy.

Although Parsons had followed the policy on earlier occasions, she testified that she thought that visits to the nurse were an employee benefit. She testified she did not know that there was a mandatory policy of visiting the nurse before leaving work because of illness.

From this evidence, a reasonable person could find that Parsons did not know of the policy. The fact that a different conclusion could be reached is irrelevant. See New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269, 270 (Iowa 1982). Therefore, the majority is bound by the finding that Parsons did not

know of the company policy. And, clearly, it is not a disregard of the employer's interest to violate a policy which the employee does not know exists. Violation of company policy is not a basis for finding misconduct in this case.

II. Lying as Misconduct. I believe that the department erred as a matter of law in holding that Parsons' conduct constituted misconduct as that term is contemplated under section 96.5(2) of the Iowa Code. I do not question the employer's right to terminate Parsons for lying. The issue I address relates solely to whether Parsons is entitled to unemployment compensation.

Iowa Code section 96.5(2) provides that a claimant is disqualified from unemployment benefits if the department finds that the individual has been discharged for misconduct in connection with the individual's employment. Budding v. Iowa Dept. of Job Service, 337 N.W.2d 219, 221 (Iowa Ct. App. 1983). The Department of Job Service has defined misconduct as:

> . . . a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evidencing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

370 Iowa Admin. Code §4.32(1). In order to support a disqualification from unemployment benefits, the misconduct must be substantial. Budding, 337 N.W.2d at 222. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits. Id. See also Cosper v. Iowa Dept. of Job Service, 321 N.W.2d 6, 10 (Iowa 1982) (quoting In Re Therrien, 132 Vt. 535, 537, 325 A.2d 357, 358 (1974)). These principles are in accord with the

principle that "the Employment Security Law should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." Id. (citations omitted).

I reject the argument that intentionally lying to the employer is misconduct per se. I conclude instead that each instance of lying should be examined for its effects on the employer, on the employee's primary duties and obligations, and on other workers.

First, there is support for this conclusion in 370 Iowa Administrative Code section 4.32(6). That section states:

> False work application. When a willfully and deliberately false statement is made on an application for work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer. (emphasis added).

The language of this section clearly indicates that the proper focus is on the effects, actual or potential, of the false work application. I find no reason why other false statements made to the employer should be treated differently. I also believe, however, that in all instances in which the effects of lies—other than false work applications—do not justify a finding of misconduct under section 4.32(6), the court should still examine the conduct of the employee and the effect of the lies pursuant to the standards set out in the definition of misconduct, section 4.32(1).

There is further support for the conclusion that the focus should be on the effect of the lie in Budding, 337 N.W.2d 219. In Budding, this court considered whether use of vulgar language while at work constitutes misconduct. In analyzing that issue, the court stated that the answer depends on the circumstances in which the vulgar language was used. Id. at 222. While the Budding opinion does not explicitly say so, the reason the circumstances in which

the language is used matter is because the same language can have different effects in different circumstances.

Second, the effects of the lies told by Parsons do not justify a finding of misconduct when applying the standard found in 370 Iowa Administrative Code section 4.32(6). The lies did not endanger the health, safety, or morals of others, did not expose the employer to legal liabilities or penalties, and did not result in the employer being put in jeopardy.

Third, I do not believe that the entire course of Parsons' actions and the effect of her lies are sufficient to show a "substantial disregard of the employer's interests or of [her] duties and obligations to the employer," constituting misconduct under 370 Iowa Administrative Code section 4.32(1). Although Parsons' concern for the interests of her employer was not perfect, neither was it totally lacking. Parsons decided to report to work May 20, even though she had been ill the day before. When it became apparent she was still ill and could not continue working, Parsons did not immediately go home. Instead, she informed her supervisor of the fact that she was leaving and her reasons for doing so. There is also evidence that when she was unable to report to work the morning of May 21, Parsons tried to leave a message for her supervisor. And it is undisputed that Parsons did return to work at noon on May 21. I cannot say these actions constitute substantial disregard for the employer's interest.

I realize Parsons also lied to her supervisor on May 20. When asked why she had lied, Parsons testified, "I don't know. I guess I just — felt so bad. I just didn't — I wasn't really even thinking." This explanation is not compelling. Nonetheless, it is understandable that a person suffering from nausea and diarrhea may do something rash.

The lies Parsons told on May 21 were also rash acts, designed to save her job. Such action deserves no sympathy. Honesty is the best policy in situations similar to the one Parsons was in. However, I cannot ignore the fact that these cover-up

lies had no detrimental effect on the employer. Nor did they, or the lie told the day before, relate to Parsons' work duties. I must therefore conclude that Parsons was not guilty of misconduct within the meaning of 370 Iowa Administrative Code section 4.32(1).

If there was no evidence that Parsons was sick when she left work, I would find her actions to be misconduct because they would then show blatant, willful disregard of the employer's interest. However, the employer has never seriously questioned whether Parsons was ill when she left work. Moreover, there is substantial circumstantial evidence that Parsons was ill. Therefore, and for the reasons stated above, I do not find her actions to be misconduct.

I would reverse the decisions of the department and the district court.

Oxberger, C.J., joins this dissent.